

EP 1/2006

BEFORE

THE HON'BLE MR JUSTICE H. N. SHARMA

THIS PETITION HAVING BEEN HEARD ON THE 26 TH DAY OF SEPTEMBER, 2006, THE COURT PASSED THE FOLLOWING:

JUDGMENT

By this election petition filed under section 80 read with section 81 of the Representation of Peoples Act, 1951, the petitioner has challenged the legality and validity of the election of the respondent No 1, the returned candidate, from No 82 Raha (SC) Legislative Constituency in the last general election, held on 10.4.2006.

2. Apart from the returned candidate, the respondent No 1, the election petitioner has also impleaded another candidate who contested from the aforesaid constituency as respondent No 2, challenging the acceptance of his nomination paper as illegal and improper.

3. As per the programme of the general election to the Assam Legislative Assembly declared by the Election Commission of India, so far it relates to No 82 Raha (SC) Legislative Assembly Constituency were as follows:

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| i) | Last date of filing Nomination Papers : | 24.3.2006 |
| ii) | Date of scrutiny of Nomination Papers : | 25.3.2006 |
| iii) | Last date of withdrawal of candidature : | 27.3.2006 |
| iv) | Date of Poll | : 10.4.2006 |
| v) | Date of counting | : 11.5.2006 |

4. In terms of the election notification, as many as, nine candidates including the petitioner and the respondents submitted their nomination papers. At the time of scrutiny, the nomination papers submitted by all the candidates having found to be valid, the Returning Officer accepted all of them and polling took place as per schedule on 10.4.2006.

5. The election petitioner contested the election as a candidate sponsored by Indian National Congress (for short the INC) whereas the respondent No 1 was supported by the Assam United Democratic Front (for short the AUDF). On the other hand, the respondent No 2 was a candidate sponsored by the Asom Gana Parishad (P), (for short the AGP(P)). After the election was over, the counting of votes took place on 11.4.2006 and the election petitioner secured a total number of 32,585 valid votes and the respondent No 1 secured 32,972 number of valid votes. The respondent No 2 secured only 1957 No. of votes. Thus, the respondent No 1 having secured the highest No. of valid votes was declared elected by a margin of 387 votes over the petitioner.

6. The petitioner has challenged the election of the respondent No 1 alleging that he has not made due declaration in his nomination paper as required under the law and stipulated in Part III and IIIA of the nomination paper framed under Form- 2A of the Conduct of Elections Rules, 1961 and accordingly, his nomination paper was illegally and improperly accepted by the Returning Officer which has materially affected the results of the election and, therefore, the same is liable to be declared void.

7. It is also pleaded that although respondent No 2 is not a member of the Scheduled Caste community recognized in the State under the Constitution (Scheduled Caste) Order, 1950, he being a member of the Matak community and falls within the category of Other Backward Classes and the said constituency being reserved for the Scheduled Caste candidate only, the acceptance of his nomination paper by the Returning Officer, is illegal which has materially affected

the result of the election. It is further alleged that the respondent No 2 being a member of the Kathiatoli Anchalik Panchayat of Nagaon district held an office of profit within the meaning of law and, as such, acceptance of his nomination paper was liable to be rejected on this count also and the margin of difference between the election petitioner and the returned candidate being only 387 votes and the respondent No 2 having polled 1957 votes, the acceptance of nomination of respondent No 2 has materially affected the result of the election.

8. Pleading in the aforesaid manner, the election petitioner has prayed for setting aside the election of the respondent No 1 from the said constituency declaring the same to be void under section 98(b) of the Representation of Peoples Act, 1951, by awarding costs in his favour.

9. The notice of the election petition having been served upon the respondents, they entered appearance and contested the petition by filing written statements categorically denying the allegations made against them in the election petition.

10. The respondent No 1 has denied the allegation that he has not made declaration in his nomination paper as stipulated in Part III and IIIA thereof. He further pleaded that the election petition lacks material particulars as to how and on what manner and in which column the respondent No 1 has not made such declaration in the nomination paper.

11. Similarly, the respondent No 2 has also stoutly denied that he is not a member of Scheduled Caste community not being eligible to contest the election from No 82 Raha (SC) Legislative Assembly Constituency and asserted that he belongs to Scheduled Caste community. He also denied the allegation that he has been holding the office of profit within the meaning of law disentitling him from contesting the election.

12. On the basis of the pleadings of the parties, the following issues were framed.

- 1). Whether the Election petition is maintainable ?
- 2) Whether there is any cause of action for the election petitioner ?
- 3) Whether the nomination paper of Respondent No.1 was improperly and illegally accepted and if so, whether such acceptance has materially affected the result of his election rendering the same liable to be declared void ?
- 4) Whether the Respondent No.2 is a necessary party in the election proceedings ?
- 5) Whether the nomination paper of Respondent No.2 was improperly accepted and if so, whether such acceptance has materially affected the result of the election so far it relates to the election of the returning candidate ?
- 6). Whether the Respondent No.2 as a member of Kathiatali Anchalik Panchayat at the time of filing of the nomination was disqualified from being chosen as a member of the Assam Legislative Assembly as per the mandate of Article 191 (1)(a) of the Constitution of India and if so, whether such acceptance of the nomination paper of the Respondent No.2 has materially affected the result of the election ?
- 7) Whether the Election petitioner is entitled to any relief and if so, to what extent ?

13. During the course of hearing the election petitioner examined as many as seven witnesses and exhibited eight numbers of documents. The respondent No 1 examined only himself on his behalf and exhibited one document whereas the respondent No 2 examined three witnesses including himself and exhibited eight numbers of documents.

14. Heard Mr N Dutta, learned senior Advocate assisted by Mr SS Dey, learned counsel for the election petitioner, Mr AB Choudhury, learned senior Advocate assisted by Mr JP Sarma, learned counsel for the respondent No 1 and Mr B C Das, learned senior Advocate assisted by Mr A Dasgupta and Ms P Barman, learned counsel for the respondent No 2.

15. Upon hearing the learned counsel for the parties, I on the basis of the pleadings of the parties, evidence- both oral and documentary and the relevant laws, decide the issues as follows.

Issue No 1:

This issue relates to maintainability of the election petition. The respondents have not made any argument against the maintainability of the election petition. The election petition has been filed under section 80 read with section 81 of the Representation of Peoples Act, 1951, within the statutory period of limitation in accordance with the provisions as contained in the Representation of Peoples Act, 1951 and duly following the relevant provisions of the Gauhati High Court Rules. Accordingly, in the absence of any material or ground to hold otherwise, I decide this issue in affirmative.

Issue No 2:

The petitioner has challenged the election of the returned candidate from No 82 Raha (SC) Legislative Assembly Constituency held on 10.4.2006. In the said election, the election petitioner contested the election. The election petitioner has alleged that the nomination paper of the respondent No 1 was improperly accepted as he did not make due declaration in Part III and IIIA of the nomination paper as framed in Form No 2A under the Conduct of Elections Rules, 1961. It is also alleged that for such violation, the nomination of the respondent No 1 ought not to have been accepted and the same should have been rejected as per the provisions of section 36(2)(b) of the Act. It is also alleged that the respondent No 2 is not a member of recognized Scheduled Caste Community of the State. Accordingly, the acceptance of the nomination paper of the respondent No 1 was not proper and for such improper acceptance of his nomination paper the results of the election has been materially affected. That apart, it also alleged that the respondent No 2 has been holding the office of profit he being a member of the Kathiatoli Anchalik Panchayat elected from the Debnarikoli Gaon Panchayat, and hence acceptance of his nomination paper is illegal on this count also.

The respondents have contested this issue and denied the allegations in their written statements. Consequently, I find that the assertion of facts made by the petitioner, if goes un rebutted, the petitioner would get the necessary relief and hence I find that there is cause of action for trial of the election petition. Accordingly, this issue is answered in affirmative.

Issue No 3:

This issue is one of the major issues to be decided in this election petition. The election petitioner has pleaded that the respondent No 1 has not made due declaration as required under the election law as stipulated in Part III and IIIA of the nomination paper in Form No 2A under the Conduct of Elections Rules, 1961. It is correct that in the election petition it has not specifically mentioned which portion or column of Part III and IIIA of the nomination paper has not been filled up the respondent No 1. The petitioner also has not specified this in his examination in chief, as PW- 1. In his cross-examination, he stated that the respondent No 1 has not signed all the required pages of the nomination paper and he raised objection about the validity of the nomination paper

of the respondent No 1 before the Returning Officer at the time of scrutiny. But this fact of raising objection before the Returning Officer has not been pleaded in the petition nor stated in his examination in chief.

PW- 4 is the Returning Officer. In his examination in chief he proved the nomination of respondent No 1 as Ext- R(1) and the list of validly nominated candidates, as Ext- P/7, where the names of the respondents also contains. In cross-examination, this witness stated that after the scrutiny of the nomination paper of the respondent No 1, the same was found to be correct and proper. Accordingly, the same was accepted and to that effect he made an endorsement at page- 5 of the nomination paper, the Ext- R/1. He further specifically stated that no objection was raised before him challenging the validity of the nomination paper of the respondent No 1 at the time of scrutiny.

The respondent No 1, RW- 1, in his evidence in chief stated that the statement that he did not make necessary declaration in Part III and IIIA in Form No 2A is totally baseless. He further stated that no objection was raised by any of the contesting candidates or their agents regarding the validity of his nomination paper at the time of scrutiny. He duly filled up all columns of the nomination paper and signed in each and every page of the same. In cross-examination by the election petitioner, RW- 1 stated that he was a candidate from AU DF and the said party was not recognized political party at the time of submission of his nomination paper and this was within his knowledge. On being shown the Ext- R/1, he admitted that he has not deleted any portion of Sl No Kha(2) (under objection) of Ext- R/1. He denied the suggestion that he has not made due declaration as alleged in the election petition. He also denied the suggestion that the election petition raised objection before the Returning Officer regarding the validity of his nomination paper.

These are the materials in support of the election petitioner so far the oral evidence led by him to prove this issue. In order to prove this issue, the election petitioner has only relied on the statements of the PW- 1, PW- 4(Returning Officer) and RW- 1 and Ext- R/1. On scrutiny of the Ext- R/1, the nomination paper (in Assamese) filed by the respondent No 1, it is evident that at Column - Kha (2) of Part III and IIIA of the nomination paper, the respondent No 1 has not deleted / cut the unnecessary portion as instructed in the said column. The English version of Column - Kha (2) of Part III and IIIA of the nomination paper reads as follows:

That I am being set up in this election by the party which is a registered - unrecognized political party. That I am contesting this election as an independent candidate (strike out which is not applicable) and the symbol I have chosen in order of preference are - (a)
(b) .

On scrutiny of the nomination paper of the respondent No 1, R/1, I find that the candidate has put the name of the political party who has set up him in the election as AU DF and his election symbol was put on.

Mr Dutta submits that the respondent No 1 not having deleted the unnecessary portion in the aforesaid portion of Part III and IIIA of the nomination paper as required by law, on that count alone his nomination paper was liable to be rejected under the provisions of section 36(2)(b) of the Act. It is submitted that under section 33(1) of the Act, it is the legal obligation of a candidate to present a nomination paper completed in prescribed form and the respondent No 1 not having completed the said prescribed form by striking out the unnecessary portion, acceptance of his nomination paper was improper. Learned counsel further submits that even without raising any objection by any of the candidates, it was the legal obligation of the Returning Officer to examine this aspect of the nomination paper regarding its validity as per section 36(2) of the Act a

nd the said lapse on the part of the respondent No 1 is a defect of substantial character within the meaning of section 36(4) of the Act and hence, the same ought not to have been ignored by the Returning Officer. Referring to Tenth Schedule of the Constitution leading to disqualification of a candidate for being chosen as a member of Legislative Assembly under Article 191 of the Constitution of India, it is submitted that such striking out of inapplicable portion from Column - Kha (2) of Part III and IIIA of the nomination paper is a necessary factor for disqualification on the ground of defection. On such analogy, it is submitted that the said defect is of substantial character.

Mr AB Choudhury, learned senior counsel for the respondent No 2, on the other hand, submits that a bare reading of the aforesaid Column Kha (2) would disclose that for not striking out the inapplicable portion would not materially alter the situation, inasmuch as, the respondent No 2 has specifically stated that he has been set up in the election by the AUDF which is a registered - unrecognized political party and has not contested as an independent candidate. He further submits that the Assamese version of the nomination paper is slightly deviated from the English version it is submitted that writing the name of the party who has set up his candidature, itself excludes that he has contested the election not as an independent candidate but on the support of an unrecognized political party mentioned in the said column.

In order to categorize it as a valid nomination paper a candidate has to submit his nomination paper as per section 33 of the Act which should be completed in the prescribe form and signed by the candidate and by an electorate of the constituency. The nomination paper presented under section 33 of the Act shall be completed as per the Form 2A to 2E as prescribed in rule 4 of the Conduct of Elections Rules, 1961. Admittedly, the respondent No 1 has not deleted the inapplicable portion from the said clause Kha(2) of Part III and IIIA of the nomination paper. However, in order to invalidate a nomination paper for non-compliance of section 33 of the Act, the defect is to be of a substantial character in terms of section 36(4) of the Act. Although it is submitted by Mr Dutta referring to proviso to Rule 4 of the Conduct of Elections Rules, 1961, that by making a provision therein that failure to complete or defect in completing, the declaration as to symbols in a nomination paper in Form 2A shall not be deemed to be a defect would be of a substantial character, would certainly mean other defects to be of substantial character, but such a meaning is not attracted by the said proviso. By inserting the said proviso to rule 4 it cannot be held that there can not be any other defect which are not substantial in nature or otherwise all defects other than that of symbol are of substantial character. There may be some other defects / defect which are also not of substantial character. The said proviso speaks defect relating to the election symbol only. Such an interpretation of rules is on the face of it is not attracted. On a close scrutiny of the said column Kha (2) of Part III and IIIA of Ext- R/1, I find that for not striking out the inapplicable portion will not materially alter the position for which the clause has been inserted. Mentioning of the name of the party which has set up the candidate for the election would be indicative of the necessary information and intention as required to be furnished by the candidate. Accordingly, I hold that the alleged defect is not of substantial character and for that count the nomination of the respondent No 1 was not liable to be rejected. The other allegation of not signing the nomination paper in each pages, etc. as alleged in the pleadings could not be proved at all and the Ext- R/1 belies such allegation. The learned counsel has also not agitated those allegations. In view of the aforesaid discussions, the Issue No 3 is answered in negative and against the election petitioner.

Issue No 4:

The respondent No 2 is a contesting but defeated candidate in th

e election. The challenge to the election of a returned candidate can be made only by filing an election petition in the High Court as provided under Chapter II Part VI of the Act and no election can be called in question except by filing such an election petition in the High Court in accordance with the provisions of Part VI of the Act. Section 82 of the Act mandates that an election petitioner is to join as respondents to his petition (a) where the petitioner, in addition to claiming declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates and (b) any other candidate against whom allegations of any corrupt practice are made in the petition.

The necessary requirement as to what should contain in the petition, relief that may be claimed and the procedure for trial of such election petition has also been provided in the Act.

In the instant election petition there is no allegation of any corrupt practice against anybody. Further the election petitioner has also not claimed for a declaration that he himself or any other candidate have been duly elected. Consequently, in the absence of the aforesaid allegation, declaration, except the returned candidate, ie, the respondent No 1, any other contesting candidate including the respondent No 2 is not statutorily required to be impleaded as party respondent. Hence the respondent No 2 is not at all a necessary party to the election proceeding and he has been wrongly impleaded. The submission of Mr Dutta that since the respondent No 2 on receipt of the notice appeared in the proceeding and contested the same by filing written statements, this issue has become redundant cannot be accepted in view of the statutory requirements as provided under section 82 of the Act. Accordingly, this issue is answered in negative and against the election petitioner. In arriving at the aforesaid decision, I am fortified with the law laid down by the Apex Court reported in AIR 1982 SC 383 : 1991 (2) (supp) SCC 624 and AIR 1964 SC 1545.

Issue No 5:

The election petitioner pleaded at paragraph- 13 of the petition, inter alia, that the respondent No 2 was illegally allowed to contest the election, inasmuch as, he is not a member of the Scheduled Caste community as mentioned in Part II of the Constitution (Scheduled Caste) Order, 1950 (an amended) on the face of the constituency in question being a reserved constituency for the Scheduled Caste candidates. It is pleaded that the respondent No 2 is a member of Matak community and is a disciple of Sri Sri Mayamara Gorhpara Satra, Dibrugarh and Shri Padma Kanta Das, PW- 6 who is a member of the Sub-Divisional Scheduled Caste Development Board, Nagaon, certified that the respondent No 2, is not a member of the Scheduled Caste community but a member of Matak community. It is also pleaded that the concerned Government Gaonburah has certified the respondent No 2 to be a member of Matak community and a similar certificate has also been issued by Sri Durga Das, RW 2/3, who is the President of the Asom Anusuchita Jati Parishad, Nagaon, certifying the respondent No 2 to be a member of Matak community, which is recognized as Other Backward Classes and not a member of the Scheduled Caste community. The contention of the election petitioner is that the respondent No 2 not being a member of the Scheduled Caste community of the State of Assam, is not entitled to contest the election from the said constituency and his nomination was improperly accepted. It is further alleged that the margin of difference of votes between the election petitioner and the returned candidate, respondent No 1, is only 387 which is even less than ... votes polled by the respondent No 2, who secured only 1957 votes. Accordingly, having regard to the margin of difference between the vote secured by the respondent No 1 and the election petitioner and the proportion which the said margin appears to the number of votes polled by the respondent No 2, it is evident that the results of the election in so far it relates to the returned candidate has been mater

ially affected rendering the same liable to be declared void.

The statements made in paragraph- 13 of the petition has been traversed by both the respondents. Denying the said allegations, the respondent No 2 pleaded, inter alia, that he is a member of the Scheduled Caste community and it is also a fact that he is a disciple of Sri Sri Mayamara Gorhpara Satra and Sri Mahadananda Goswami, Satradhikar and relies on the certificate issued by Sri Mahadananda Goswami, and Jogodananda Goswami, Satradhikars, Exts- R/5 and R/6. The respondent further stated that the Sub-Divisional Scheduled Caste Development Board, Nagaon which is a competent authority, has issued a certificate dated 3.9.93 certifying him to be a member of the Scheduled Caste community, ie, Koiboratra community which is a recognized Scheduled Caste community of Assam under the Constitution (Scheduled Caste) Order, 1950. The respondent No 2 has also relied on the certificates issued by the Government Gaonburah of Ghilani village, letter dated 13.7.78 issued by the President of the Asom Anusuchita Jati Parishad, Nagaon, addressing to the Chairman, Sub-Divisional Scheduled Caste Development Board stating that the respondent No 2 belongs to Scheduled Caste community (Koiboratra). It is further pleaded that he was also selected for the office of the Secretary of Asom Anusuchita Jati Parishad, Nagaon, in the year 1998 and the Deputy Commissioner, Nagaon also issued a caste certificate dated 7.11.94 certifying him to be of Koiboratra Community. The certificate in Annexure- II relied on by the election petitioner alleged to have been issued by Sri Membor Bora, Government Gaonburah of Ghilani Village, is pleaded to be false and fabricated.

The respondent No 1 also denying the allegations made by the election petitioner at paragraph- 13 of the election petition pleaded at paragraph - 18 of the written statements, inter alia, that the contention of the petitioner that having regard to the margin of difference between the votes secured by the returned candidate and the candidate securing the next higher number of votes and the proportion which the said margin bears to the number of votes polled by the respondent No 2, it is evident that the result of the election in so far as it concerns the returned candidate has been materially affected rendering the same liable to be declared void has been pleaded to be surmises and conjectures on the part of the election petitioner and the election of the returned candidate cannot be said to have been materially affected in view of the fact that admittedly there having altogether nine candidates in the fray, there was no absolutely no guarantee or certainty that all the 1957 votes polled by respondent No 2 would have been cast in favour of the election petitioner and not to any other candidates.

In support of the aforesaid pleadings, the election petitioner relies on the statements of PW- 1 (election petitioner), PW- 2, PW- 4, PW- 6 and PW- 7 and the documentary evidence, Exts- P/1, P/2 and P/3.

On the contrary, the respondent No 2, in support of his assertion that he belongs to the Scheduled Caste community relies on the statements of RW- 2/1, RW- 2/2, RW- 2/3 and the documentary evidence vide Exts- R- 1/2, R- 3/2, R- 4/2, R- 5/2, R- 6/2 and R- 7/2.

The relevant portion of the pleadings of the parties in support of their assertions and counter assertions requiring adjudication of this issue have been set out hereinbefore. Let us now peruse and scrutiny the evidence, both the oral and documentary, adduced by the parties in support of their respective claims.

PW- 1 the election petitioner, in his affidavit in chief stated, inter alia, that the polling was held on 10.4.2006 by means of electronic voting machine and the counting was held on 11.5.2006. After the counting was over he was found to have polled in total 32,585 Nos of valid votes, the respondent No 1 was found to have polled 32,572 Nos of valid votes whereas the respondent No

2 found to have polled on 1957 Nos of valid votes. Accordingly, the respondent No 1 was declared elected from the said constituency, he having secured 387 more valid votes than the election petitioner. He also deposed that the respondent No 1 did not make any due declaration as required to be made in Part III and IIIA of the nomination paper filed by him and accordingly his nomination paper ought to have been rejected by the Returning Officer and acceptance of his nomination paper has materially affected the results of the election. He further stated that the respondent No 2 also did not make any due declaration as required to be made in Part III and IIIA of the nomination paper filed by him, that the respondent No 2 is a member of the Kathiatoli Anchalik Panchayat, he having been elected from Devanarikoli Gaon Panchayat in the year 2002 and on the date of filing the nomination paper and even as on date, he continues to be a member of the said Panchayat and receives remuneration of Rs. 500.00 per month as a member of the Anchalik Panchayat which is an office of profit and consequently, he is disqualified to be chosen as a member of the Legislative Assembly and his nomination paper was improperly accepted which has materially affected the result of the election of the respondent No 1. It is further stated by PW- 1 that the respondent No 2 is not a member of any recognized Scheduled Caste community of the State of Assam, that he is a member of Matak community and he himself claims to be a Matak which is recognized as Other Backward Class community. The respondent No 2 is a resident of Ghilani Matak gaon under Kampur Mouza in the district of Nagaon and the said village is inhabited by Matak community and his father and ancestors had been residing in the said village. PW- 1 further exhibited the certificate issued by Sri Membor Bora, Government Gaonburah of Ghilani village (Rw- 2/2) certifying the respondent No 2 to be a member of Matak community as Ext- P/1. He also exhibited certificate issued by Sri Padma Kanta Das (PW- 6), who is a member of Sub-divisional Scheduled Caste Development Board, Nagaon, certifying that the respondent No 2 is a member of Matak community, as Ext- P/2. This witness further proves the Ext- P/3 which is a certificate issued by Sri Durga Das (RW- 3/2), as President of Asom Anusuchita Jati Parishad, Nagaon Branch certifying the respondent No 2 to be a member of Matak community which is a Other Backward Class and not a member of the Scheduled Caste community. He further proves a certificate issued by Sri Benu Ahmed, PW- 5, who is the President of Kamrup Anchalik Panchayat certifying the respondent No 2 to be an elected member of the Kathiatoli Anchalik Panchayat from Devanarikoli Gaon Panchayat in the 2002 and he continues to hold the said post as Ext- P/4. PW- 1 also states in his evidence in chief that the respondent No 2 is a member of Matak community which is recognized as Other Backward Classes in the State of Assam and not a member of the Scheduled Caste community and is not entitled to contest or to file nomination paper from No 82 Raha (SC) Legislative Assembly Constituency and legal and improper acceptance of his nomination paper has materially affected the result of the election.

This witness was cross examined by both the respondents. In cross-examination by the respondent No 2, PW- 1 stated that he raised objection at the time of scrutiny of the nomination paper of the respondent No 2. Admissibility of this part of the statement and/or legal effect thereof was seriously contested by the learned counsel for the respondent No 2, inasmuch as, this fact of raising such objection has not been pleaded in the election petition. In cross examination, the witness admitted that the objection raised by him before the Returning Officer was oral but the Returning Officer did not entertain the same. On the later part of his cross examination, PW- 1 stated that at the time of scrutiny he did not know that the respondent No 2 hails from Ghilani village so he could not raise objection before the Returning Officer. Thus two contradictory stands are found to have taken by this witness on this point. He also stated to have collected the certificate Ext- P/1 through his agent Sri K Das and Sri D Das. He admitted that he does not know the signature of Sri Membor Bora, the author of Ext- P/1 and affirmed the signature of Sri Membor Bora. He further denied the suggestion that Sri Padma Kanta Das, PW- 6, has no authority to issue such certificate. He admitted that he has not filed any application to get Ext- P/3. The PW-

1 specifically states that he does not know how many votes were exactly polled by other candidates apart from respondent No 2.

Pw-2, is Sri Nishi Kanta Das, who has deposed, inter alia, that he knows the respondent No 2 and also his father late Ghanashyam Hazarika as he was also engaged in the same trade like his father, ie, trading of paddy and jute. He stated that the respondent No 2, his father and all the villagers of Ghilani Matak Gaon belong to Matak community and not a single family of any other community is residing in that village. He stated that the respondent No2 is a Matak and not a member of Scheduled Caste community. He also states that he belongs to Koibortra community which is recognized as Scheduled Caste community and they do not have any social relation or interaction with persons of Matak community. In cross-examination, he denied the fact that there is no village like Ghilani but admitted that Ghilani is a kissamat and the Ghilani Matak is a village. He does not know whether the entire villagers are Matak. He does not know Sri Amulya Hazarika and his brother and he would not be able to identify the respondent No 2. He does not admit the suggestion that 90% of the villagers of the said village belong to Scheduled Caste community.

PW- 3 is the Secretary of the Government of Assam, Department of Welfare of Plains Tribes and Backward Classes. This witness produced a Government file No TAD / ST / 110 / 93 containing relevant documents regarding issuance of caste certificates. This witness was not cross-examined by any of the respondents. In fact, PW- 3 was summoned by the petitioner only to produce the said Government file.

PW- 4 is Sri Surendra Mohan Deka, who was the Returning Officer of the Constituency in the said general election and has produced the nomination papers of the candidates. He stated that a notification dated 17.3.2006 was published in the Assam Gazette notifying the election of different constituencies including No 82 Raha (SC) Legislative Assembly Constituency by the Chief Secretary to the Government of Assam, that he was appointed as the Returning Officer for the aforesaid No 82 Raha (SC) Legislative Assembly Constituency by the Election Commission of India. He has also produced Ext- P/7, which is a list of validly nominated candidates and the final result sheet of the election in Form- 20 was proved by him as Ext- P/8. In cross-examination, the PW- 4 stated that after the scrutiny of the nomination paper of respondent No 1 he found it correct and proper and hence he accepted the same and to that effect a note has been made at page- 5 of the nomination paper. He specifically stated that no objection was raised by anybody in accepting the nomination paper of the respondent No 1. The nomination paper of the respondent No 1 is proved as Ext- R 1/1. He also stated that he did not receive any objection challenging the validity of the nomination paper filed by the respondent No 2. He scrutinized the nomination paper filed by the respondent No 2 in presence of all the candidates in the fray and on scrutiny, he found it to be correct in all respects and hence it was accepted and to that effect an endorsement was also made by him.

PW- 5 has not stated anything relating to the Issue No 5. This witness deposed only relating to allegation as regards the office of profit raised by the election petitioner against the respondent No 2.

PW- 6 is Sri Padma Kanta Das, who deposed, inter alia, that Ghilani Matak Gaon falls in the Ghilani Kissamat of Kampur Mouza and the respondent No 2 and his father late Ghanashyam Hazarika belong to Matak community and they are residents of Ghilani Matak Gaon. He further stated that there is not a single Scheduled Caste community, particularly, in Ghilani Matak Gaon. He further states that he belongs to Koibortra community and Matak is not included in the list of Scheduled Caste. Further this witness deposed that the Matak community has a different social norms and custom than that of the Scheduled Caste community people. This witness also proved Ext- P/2 which was issued by him. In cross-

examination, this witness stated, inter alia, that as requested by the election petitioner he issued the certificate Ext- P/2 which was not issued in his official pad. He also stated that the Sub-Divisional Scheduled Caste Development Board do not use any official pad so he issued the certificate in a plain paper and only the Chairman can use the official pad. He further stated that at present there is no Chairman in the Sub-Divisional Scheduled Caste Development Board at Nagaon and although no date is mentioned in the Ext- P/2 yet it was issued in the month of May, 2006. He further stated that at village Ghilani the majority of the people are Matak community and no member of Scheduled Caste community resides there. He does not know whether in the service record of Sri Amiya Hazarika, the brother of the respondent No 2, who is serving as Kanangoh, there is an endorsement as Scheduled Caste community in his service book or not. He further states that the Sub-Divisional Scheduled Caste Development Board issued a certificate dated 3.9.93 in favour of the respondent No 2 certifying him to be a member of Koiboratra community. He further stated that Ext- P/2 was issued by him on his personal knowledge.

The last witness in support of the election petitioner is Sri Satyen Goswami, PW- 7, who is the Mouzadar of Kampur Mouza, under whom the village of the respondent No 2 falls. In his deposition, he has stated, inter alia, that he knows the respondent No 2 who is a resident of Ghilani Matak Gaon and he also knows his brother Sri Amiya Hazarika who has been serving as Kanangoh in the office of the Circle Officer, that the respondent No 2 belongs to Matak community, that now a days some of them use to write their title like Hazarika, Barua, Kakaty, etc. although they belong to Matak community, Matak community is recognized as one of the Backward classes of Assam. This witness further stated that there is no Scheduled Caste community people in the Ghilani Matak Gaon and the respondent No 2 is not a member of Scheduled Caste community. In cross-examination this witness stated that he does not know whether Sri Amiya Hazarika is the brother of the respondent No 2 and has been serving as Kanangoo as a member of Scheduled Caste community. He admits that as a Mouzadar it is not his duty to maintain the caste records of different communities and he does not know whether there is Scheduled Caste community people around the respondent No 2's residence or in nearby areas; this witness further stated that he does not know whether the respondent No 2 belongs to Scheduled Caste community or not but he is from Matak community and there is no revenue village as Ghilani Matak Gaon.

In support of his case the respondent No 2 examined three witnesses including himself and exhibited several documents.

The respondent No 2 was examined himself as RW- 1/ 2. In his evidence in chief he stated, inter alia, that as he is a member of the Scheduled Caste community, he filed nomination paper for contesting the election from No 82 Raha (SC) Legislative Assembly Constituency which is a reserved constituency for Scheduled Caste community candidates. He states that at the time of scrutiny of his nomination paper, the election petitioner and other candidates were present but no objection was raised regarding the validity of his nomination paper at that point of time and the petitioner has raised this malafide objection now which is an afterthought one. The respondent No 2 further states that he is a member of Koiboratra community which is recognized as Scheduled Caste community under the Constitution (Scheduled Caste) Order, 1950. He has also proved the Ext- R/2/1 (corresponding to Annexure- D of the written statement) issued by the Sub-Divisional Scheduled Caste Development Board, Nagaon, dated 3.9.93 vide Sl No 1763 certifying him to be a member of Scheduled Caste community, Koiboratra. He has also proved Ext- R/2/3 the certificate dated 7.4.83 issued by the Deputy Commissioner, Nagaon, certifying him to be Koiboratra which is recognized as Scheduled Caste under the Constitution (Scheduled Caste) Order, 1950 (corresponding to Annexure- G of his written statement). The respondent No 2 has further proved the certificate dated 17.7.2006 issued by Sri Membor Bora, RW-2/2, as Ext- R/4/2 which disclose that the respondent No 2 is a member of Scheduled Caste community.

This witness has proved a letter dated 13.7.98 as Ext- R/7/2 issued by Sri Durga Das, RW/2/3, the President of Asom Anusichita Jati Parishad certifying that he belongs to Koiboratra community and this letter was addressed to the Chairman, Sub-Divisional Scheduled Caste Development Board, Nagaon. He further filed and proved the certificate issued by the Satradhikar, Sri Sri Mayamara Gorhpara Satra dated 1.6.2006 as Ext- R/5/2 and the certificate of the same date issued by Satradhikar, Sri Sri Mayamara Dinjoy Satra. In the aforesaid two certificates, the respondent No 2 is stated to be a member of Scheduled Caste, Koiboratra community. This witness has further submitted a certificate dated 1.6.2006 issued by the President, Tinsukia Zila Anusichita Jati Parishad as Ext- R/8/2. In his examination in chief, the respondent No 2 has further stated that he was elected in the year 2002 as a member of Kathiatoli Anchalik Panchayat and he does not get any salary or remuneration but gets honorarium of Rs. 500.00, that he is an elected member but not nominated by the Government and he has not been holding any office of profit as alleged. He denies the allegations made by the election petitioner against him.

RW- 2 was cross-examined by the election petitioner at length. During his cross-examination he states that his brother Sri Amiya Hazarika has been serving as Kanangoh. He reiterates that the facts stated in Ext- R/5/2 are true. He admits that the Chairman, Sub-Divisional Scheduled Caste Development Committee, Nagaon, has not been cited as a witness to prove the certificate issued in his favour nor he has cited Sub-Divisional Officer (Civil) Kaliabor and the Deputy Commissioner, Nagaon, as his witness. He admits that he has not stated before the authority that he is a disciple of Sri Sri Mayamara Gorhpara Satra or Sri Sri Mayamara Dinjoy Satra. He further admits in his cross-examination that apart from receiving honorarium of Rs. 500.00 per month like other member of the Panchayat, he also receives Rs. 50.00 per day as sitting allowance. On being shown a document stated to be a copy of the pata No 48 of village Ghilani Matak under Kampur mouza, this witness acknowledges that the land described therein belongs to his father but he denied that his father is not of Scheduled Caste community and denied the suggestion that his nomination paper was defective or he is holding an office of profit as alleged in the election petition.

Sri Membor Bora, who is the Government Gaonburah of Ghilani Kissamat under Kampur Mouza was examined as RW/2/2. In his examination in chief, he stated, inter alia, that the family members of the ancestors of the respondent No 2 have been residing at Ghilani Matak Gaon and they belong to Scheduled Caste community. He issued the certificate dated 17.7.2006 (Ext- R/4/2) to the effect that the respondent No 2 is a member of Scheduled Caste Nadial community and Koiboratra community is also known as Nadial community. Ext- R/4/2(2) is his signature. This witness has specifically stated that he has not issued any certificate to the election petitioner which is marked as Ext- P/1 (corresponding to Annexure - II of the election petition) and further states that the said certificate is false and fabricated. In his cross-examination by the election petitioner he reiterated and affirmed the fact of issuance of certificate, Ext- R/4/2 to the respondent No 2. He also affirmed his signature and seal, Ext- R/4/2(2). He further stated that he knew the respondent No 2 to be a disciple of Sri Sri Mayamara Gorhpara Satra and he did not state such fact in Ext- R/4/2 because the respondent No 2 requested him to issue a caste certificate. The suggestion of suppression of material facts in Ext- R/4/2 and that the respondent No 2 is not a member of Scheduled Caste community has been denied by him. Regarding his in chief evidence that Ext- P/1 is false and fabricated, no question was asked to him by the election petitioner at all, which goes unrebutted.

R/W 3 is the last witness examined by the respondent No 2. This witness is the President of Asom Anusichita Jati Parishad, Nagaon Branch. In his in chief evidence he has specifically stated that the respondent No 2 belongs to Scheduled Caste community. He also admits the issuance of the letter dated 13.7.98 vide Ext- R/7 and affirmed his signature as R/1/7 and his official pad and

R/2/7.

In his cross-examination by the election petitioner this witness stated, inter alia, that as per the request of the respondent No 2, he issued the Ext- R/2/7 and he knew him since before one year from the date of issuance of the said letter. In cross-examination he stated that he does not know whether the respondent No 2 is a disciple of Sri Sri Mayamara Gorhpara Satra or Sri Sri Mayamara Dinjoy Satra and he could know this fact only after going through the records of this case. He stated that there are so many Scheduled Caste people at Ghilani Matak Gaon and that he has relationship with some of them. He further stated that all the records relating to caste of the respondent No 2 are in his office and, as such, he issued Ext- R/2/7 without making any further enquiry. He also stated that the respondent No 2 was Secretary of the Kampur Anusuchita Jati Parishad and the Ext- R/2/7 was issued on the basis of the records. He denied the suggestion that the Ext- R/2/7 was issued out of good relationship and that he has no personal knowledge about the caste of the respondent No 2.

Let us scrutinize the necessary material facts as disclosed from the evidence adduced by the parties as highlighted above in the light of the supporting documentary evidence, as exhibited by the witnesses.

In order to prove the allegation that the nomination paper of the respondent No 2 was improperly accepted the focal point of attack of the petitioner that the respondent No 2 is not a member of the Scheduled Caste community of the State of Assam. To prove this fact the election petitioner apart from his own evidence relied on the evidence of PW- 2, PW- 6 and PW-7. He also relies on the corresponding exhibits P/1, P/2 and P/3 proved through his witnesses. Ext- P/1 is the certificate allegedly issued by Sri Membor Bora, the Government Gaonburah. In Ext- P/1 it is not stated that the respondent No 2 is not a member of Scheduled Caste community but it states that he belongs to Matak community. Conspicuously, though the author of the certificate Sri Membor Bora was examined as RW/2/2, the election petitioner did not confront to him, the Ext- P/1. On the other hand, the said RW/2/2, has specifically denied to have issued the said certificate and stated the same to be false and fabricated one. Even not a suggestion to that effect was given to this witness by the election petitioner.

Similarly, Ext- P/2 which is proved through PW- 6 states that the respondent No 2 belongs to Matak community. This exhibit is also silent about the fact as to whether the respondent No 2 belongs to Scheduled Caste community or not. In his deposition PW- 6 affirmed that the respondent No 2 belongs to Matak community and is a resident of Ghilani Matak Gaon and he tried to give an impression that as in the Ghilani Matak Gaon there is not a single Scheduled Caste community and Matak community is recognized as Other Backward Class so the respondent No 2 is not a member of Scheduled Caste community. This witness has not directly stated as to whether the respondent No 2 belongs to Scheduled Caste or not nor he has also disclosed so in Ext- P/2. This witness appears to be an evasive one and he has not come to the Court to depose the real fact. The conspicuous silence of the petitioner (PW-1) to confront the Ext- P/1/1 to this witness is a significant one and it goes heavily against the petitioner.

Similarly, on scrutiny of evidence of PW-7, Sri Satyen Goswami, Mouzadar of Kampur Mouza, it is seen that his statements are based on supposition to the effect that the respondent No 2 is not a member of Scheduled Caste community. This witness states that the respondent No 2 belongs to Matak community. Although in his in chief he states that the respondent No 2 is not a Scheduled Caste community, in his cross-examination he states that he does not know whether the respondent No 2 belongs to Scheduled Caste community but he belongs to Matak community. He further admits that as a Mouzadar in his office there is no caste records.

The election petitioner as PW-1 has deposed in chief that the respondent No 2 is not a member of a recognized Scheduled Caste community of Assam and thus he does not have the necessary eligibility criteria to contest election from a constituency reserved for the Scheduled Caste community. In cross-examination the signature in Ext- P/1/1 could not be confirmed by him whether the same is of Sri Membor Bora or not. He further admits that at the time of scrutiny of the nomination papers he did not know that the respondent No 1 hails from the Ghilani village and, therefore, he did not raise any objection before the Returning Officer. His entire conclusion about the caste of the respondent No 2 is based on the exhibits relied by him which suffers from inherent improbability.

Turning to the evidence produced by the respondent No 2 in support of his contention that he belongs to Scheduled Caste community, I find that apart from his oral statements, as RW/1/2 he also relied on several documents / certificates issued by different competent authorities. Ext- R/1/2 is the certificate issued by the Chairman, Sub-Divisional Scheduled Caste Development Board, Nagaon, which is duly counter signed by the Sub-Divisional Officer (Sadar), Nagaon, the certificate is dated 3.9.93, Book N 18, Sl No 1763 wherein it is certified that Sri Dipon Hazarika, (respondent No 2), belongs to Scheduled Caste community, which is recognized as Scheduled Caste community under the Constitution (Scheduled Caste) Order, 1950, as amended from time to time. RW/1/2 himself proved this certificate and no objection was raised at the time of admission of this document by the election petitioner. Ext- R/1/3 is another certificate issued from the office of the Deputy Commissioner, Nagaon. This certificate bears Sl No 4560 and is dated 7.11.84, which discloses that the respondent No 2 is a permanent resident of Nagaon district and belongs to the Kobortra community which is recognized as a Scheduled Caste community under the Constitution (Scheduled Caste) Order, 1950, as amended from time to time. This certificate has been signed by the Sub-Divisional Officer (Sadar) Nagaon. It also contains the office seal of the Deputy Commissioner, Nagaon. The respondent No 2 also relied on the certificate P/4/2 issued by the Government Gaonburah, RW/2/2. This certificate shows that the election petitioner belongs to Scheduled Caste community and is a resident of Ghilani village under Kampur Mouza.

The respondent No 2 further filed and exhibited Ext- R/2/5 and 2/6 issued by Sri Mohodananda Goswami, Satradhikar of Sri Sri Mayamara Gorhpara Satra and Sri Jagadananda Goswami, Satradhikar, Sri Sri Mayamara Dinjan Satra, respectively, dated 1.6.2006. These two exhibits also prove that the respondent No 2 belongs to the Scheduled Caste community. Ext- R/2/5 further discloses that the people of Scheduled Caste community, ie, Kobortra people of Ghilani village are disciples of Sri Sri Mayamara Gorhpara Satra and followers of Sri Sri Mayamara Gorhpara Satra are known as Matak . It further discloses that there are various sub-castes of Matak and they belong to Scheduled Caste community from time immemorial. R/2/7 proved by the respondent No 2 is a letter disclosing certain facts written by the President, Tinsukia Zila Anusichita Jati Parishad dated 1.6.2006 . Ext R/2/7 is a letter dated 13.7.98 issued by Sri Durga Das, RW/2/3 who was the President of Asom Anusuchita Jati Parishad wherein there is a statement that the respondent No 2 belongs to Scheduled Caste community, Kobortra.

I have also gone through the records of the file No TAD/BC/238/2006/5, produced by the PW No 3 as called for by the election petitioner. The aforesaid file contains a list of other backward classes which also includes at serial No 14 Moran and Matak . The aforesaid file further contains an official communication of the office of the Registrar General of India on the proposal regarding inclusion of Moran and Matak in the list of Scheduled Tribe of Assam wherein it is, inter alia, stated that Matak is generic term applied to a number of distinct ethnic groups living in a geographical area and the followers of Maomaria sect generally belongs to Ahom, Chutiya, Dom, Kalita, Kewat, etc. communities and not to any specific ethnic group The word Dom is synonymous to Kobortra and Dom is a colloquial term.

I have already discussed regarding the Exts- P/1, P/2 and P/3 upon which reliance has been placed by the election petitioner in support of his contention that the respondent No 2 does not belong to Scheduled Caste community.

The Ext- P/1 has been proved to be false and fabricated as discussed above and has been specifically stated so by its alleged author the Government Gaoburah, RW/2/2. Ext- P/2 has been issued in a plain paper and not any official pad by PW-6 and it also does not show on the face of it that the respondent No 2 is not a member of Scheduled Caste community. Ext- P/3 issued by RW/2/3 shows that the respondent No 2 is not a member of Scheduled Caste community. But RW/3/2 is not called upon as witness by the election petitioner. When this witness was in dock as respondents witness the election petitioner did not confront him the Ext- P/3/2 on which he places reliance. It is a rather peculiar conduct of the election petitioner. Again Ext- R/7/2 has been admitted to be issued by the same person, ie, RW/3/2. In the said Ext- R/2/3 it is specifically stated that the respondent No 2 belongs to Scheduled Caste community. Thus on the same issue two contradictory certificates were issued by same person. Natural consequence of such a stand is that the certificate issued by him is not at all reliable, apart from the fact that the election petitioner even did not make an attempt to confront him the Ext- P/3/2, whereas he admitted Ext- R/2/3. Thus Ext- P/3/2 cannot be relied on in deciding the issue as for the aforesaid reason its veracity and probative value is tremendously shaken in the eye of law making it unreliable to support the petitioner's case.

As against the aforesaid facts the respondent No 2 has duly proved Ext- R/2/1, a caste certificate issued by the Chairman, Sub-Divisional Scheduled Caste Development Board, Nagaon issued under rule 3(2) of the Assam Scheduled Castes and Scheduled Tribes (Reservation of vacancies in service and posts) Rules, 1950. Said Ext- R/2/1 issued by the Chairman, Sub-Divisional Scheduled Caste Development board, Nagaon, was duly countersigned by the Sub-Divisional Officer (Sadar), Nagaon and it was issued from the office of the Chairman, Sub-Divisional Scheduled Caste Development board, Nagaon. Therefore, the said certificate was issued in exercise of statutory power under the above rules and is an authenticated document issued by a statutory authority. Similarly, the Ext- R/3/2 was issued by the Deputy commissioner, Nagaon, under Sl No 4560 in favour of the respondent No 2 certifying him to be a member of the Scheduled Caste community. The authenticity, veracity and probative value of the aforesaid two certificates would not at all be shaken by the election petitioner. That apart, the exhibit R/5 specifically clarifies the situation about the controversy sought to be raised by the election petitioner regarding the inclusion of respondent No 2 as a Matak community.

Marshalling the evidences, both oral and documentary, admitted by respective parties, there leaves no doubt that the election petitioner has hopelessly failed to prove that the respondent No 2 does not belong to the Scheduled Caste community. As against the reliable documentary evidences produced by the respondent No 2 the oral evidence contrary to the same adduced by the petitioner witnesses are not acceptable which will have the effect of dislodging the social status of the respondent No 2.

It was submitted by Mr Dutta that as because the respondent No 2 on his own showing vide Ext- R/5/2 and 6/2 and as per the statutory order issued by the State Government placing the Moran and Matak as members of the Other Backward Classes, the respondent No 2 cannot be allowed to be considered as a member of the Scheduled Caste community. But on a close scrutiny of the aforesaid exhibits, more particularly, the Ext- P/5, it would be unsafe to hold and accept the aforesaid cut and dried formula as suggested by the learned counsel, to come to a finding that the respondent No 2 is not a member of Scheduled Caste community on the face of existence of overwhelming oral and documentary evidence to the contrary, including the relevant contentions, as noted above, in Government

file No TAD / BC / 238 / 2006 / 5, produced by PW- 3 relating to the status of Matak community.

A caste of an individual is a social recognition in the society.

The history of human being shows that people gradually developed their status by passage of time. After coming into force of the constitution, in exercise of power under Clause (1) of Article 341, the President of India issued Constitutional Order No 19 vide notification No SRO. 383, dated 10.8.1050 in consultation with the Governments of the States and as per the said Order, the Koibortra community of Assam falls under Scheduled Caste. The empowered statutory authority has issued the certificate vide Exts- P/2 and P/3 and P/7 to the effect that the respondent No 2 belongs to the Koibortra community and is a member of Scheduled Caste. Accepting of religion or following the principles of certain religious group or sect will not change the Scheduled Caste status of any citizen. This is also on the principle of our Constitutional scheme that every citizen is entitled to profess any religious faith and professing of any faith will not change his caste on the face of existence of the constitutional order, till it is denotified or modified by the President.

In this petition, the election petitioner has challenged the election of the returned candidate on the grounds stated therein. The grounds for setting aside an election has been statutorily provided in the Act. Such election petition is not like that of a declaratory suit under the Specific Relief Act. It is purely a statutory remedy relating to an election dispute to be decided strictly within the provisions of the Act. Right to be elected is neither a fundamental right nor a common law right but it is a statutory right, pure and simple; so outside the statute there is no right to be elected and also there is no right to dispute the election. Such rights are statutory creation and, therefore, subject to statutory limitations. An election can be questioned in the manner prescribed in the Representation of the Peoples Act and the Act is a complete and self-contained code within which one can find out right to election and/or election dispute (Ref: AIR 1982 SC 983, Jyoti Basu and others Vs Debi Ghoshal and others). In the aforesaid circumstances, the election petitioner cannot be permitted to challenge the status of the respondent No 2 as Scheduled Caste tangentially or co-laterally in an election petition like that in a declaratory suit. What in such circumstances is to be seen is the prima facie substance of the allegations, which the petitioner has miserably failed to prove.

In view of the aforesaid discussions, I am constrained to hold that the election petitioner has failed to show and establish that the respondent No 2 is not a member of the Scheduled Caste community even prima facie by applying the test of preponderance of probability and consequently, I hold that his Nomination paper was not improperly accepted holding him to be a member of the Scheduled Caste community.

Turning to the other kind of arguments, Mr Dutta referring to the ratio of the decision of the Apex Court reported in Vashist Narain Sharma Vs Dev Chandra and others, AIR 1954 SC 513, Chhedi Ram Vs Jhilmit Ram and others, (1984) 2 SCC 281, submitted that in the event of holding that the nomination paper of the respondent No 2 was improperly accepted, the votes polled by respondent No 2 which is only 1957 would be included into the votes polled by the election petitioner, the margin of votes between the returned candidate, respondent No 1, and the election petitioner being 387. It is the contention of the learned senior counsel that in such an event taking note of the margin of difference it is not specifically required to prove by the election petitioner that those votes polled by the respondent No 2, which are wastage votes would have polled in favour of the election petitioner.

Mr AB Choudhury, on the other hand, apart from relying on para 5, 7, 8, 9, 10 & 12 of Vashist Narain Sharma (supra) has also relied on the decision

rendered in Shiv Charan Singh Vs Chandra Bhan Singh, AIR 1988 SC 637 : (1988) 2 SCC 12, Smt Lata Devi (Mali) Vs Haru Rajwar, AIR 1990 SC 19 and submits that even if in case of have a lesser margin the burden of proof that such votes would have been polled in favour of the election petitioner will still remain and the election petitioner has not discharged the said burden in this case and, as such, the vote polled by the respondent No 2 cannot be counted in favour of the election petitioner.

It is no doubt true that none of the witnesses examined by the election petitioner including himself has deposed that had the nomination paper of the respondent No 2 been rejected, 1957 Nos of votes polled by respondent No 2 would have been casted in favour of the election petitioner. That apart, Form-20, Ext- P/8 disclosing the official result sheet prepared as per rule 56(c)(2) shows that out of the total nine candidates in the fray, the respondent No 1, polled 32,972 votes, election petitioner polled 32,585 votes and the respondent No 2 polled 1957 votes. That apart, two other candidates, viz, Sri Umesh Chandra Das and Sri Dimbeswar Das also polled a sizable Nos of votes. The position of the above noted candidates according to the number of votes polled by them as disclosed vide Ext- P/8 are indicated below:

- | | |
|---|----------------|
| 1) Sri Guneswar Das,
(respondent No 1) | = 32,972 votes |
| 2) Dr Ananda Ram Baruah,
(Election petitioner) | = 32,582 votes |
| 3) Sri Umesh Das | = 28,741 votes |
| 4) Sri Dimbeswar Das | = 26,587 votes |
| 5) Sri Dipon Hazarika | = 1957 votes |

This being the position of the votes polled it cannot absolutely be contended that in the event of declaration that the nomination paper of the respondent No 2 was accepted improperly, the votes polled by him would have gone to the election petitioner only, on the face of Sri Umesh Das and Sri Dimbeswar Das having secured a very large number of votes nearing the election petitioner, as shown above. The election petitioner has not made any attempt even to question or to elicit from his witness including himself that those 1957 votes would have been polled in his favour and would not have gone in favour of the respondent No 1 or Sri Umesh das or Sri Dimbeswar Das. However, in view of the findings that the nomination paper of the respondent No 2 was not improperly accepted, the aforesaid contention is not required to be discussed in details, and has become redundant and such a contingency would have arisen had the decision on the first part of the issue No 5 been otherwise.

On over all discussions, as aforesaid this issue is accordingly decided in negative against the election petitioner and in favour of the respondent No 2.

Issue No 6:

Although this issue was raised on the basis of the pleadings of the parties, Mr Dutta at the time of hearing of the arguments producing a copy of the Assam Act No XIII of 2006 published vide notification No LGL.60/2006/26 dated 23.8.2006 submitted that by enacting the aforesaid Act, titled as the Assam State Legislative Members (